

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 LANGER JUICE COMPANY, INC.,) CV 13-6323 RSWL (AJWx)
12 Plaintiff,)
13 v.) Order re: Defendant's
14 STONHARD, STONCOR GROUP,) Motion to Dismiss
15 INC., et al.) Pursuant to Fed. R. Civ.
16 Defendants.) P. 12(b)(6) [10]
17)
18)
19)

20 Currently before the Court is Defendant StonCor
21 Group, Inc. t/a Stonhard's ("Defendant") Motion to
22 Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) [10].
23 Plaintiff Langer Juice Company, Inc. ("Plaintiff")
24 filed its Opposition on November 26, 2013 [21].
25 Defendant filed its Reply on December 3, 2013 [24].
26 Having reviewed all papers submitted pertaining to the
27 Motion, and having considered all arguments presented
28 to the Court, the Court **NOW FINDS AND RULES AS FOLLOWS:**

1 Defendant's Motion to Dismiss Pursuant to Fed. R.
2 Civ. P. 12(b)(6) is **GRANTED**.

3 **I. Background**

4 Plaintiff is a California corporation with its
5 principal place of business in the City of Industry,
6 California. First Amended Compl. ("FAC") ¶ 1.

7 Defendant is a New Jersey corporation. Id. at ¶ 3.

8 On November 16, 2013, Plaintiff entered into a
9 contract (the "Contract") with Defendant wherein
10 Defendant was to perform work on the "Outside Area
11 Floor" at a property located in Bakersfield, California
12 (the "Bakersfield Property"). Id. at ¶¶ 6, 10.

13 Pursuant to the Contract, a four-component, trowel
14 applied, polyurethane mortar system was to be applied
15 to the "Outside Area Floor" at the Bakersfield
16 Property. Id. at ¶ 10. The system was to be sealed
17 with a high performance, chemically resistant urethane
18 sealer that would include texture for slip resistance.
19 Id.

20 The original contract price was \$21,255.00, but
21 several change orders were implemented after the
22 Parties entered into the Contract, ultimately doubling
23 the cost of the project. Id. at ¶¶ 11-12.

24 As a result of Defendant's performance of the
25 Contract work, however, the Outside Area Floor at the
26 Bakersfield Property suffers from holes where water
27 ponds, the floor has blistered, and its coloring has
28 faded. Id. at ¶ 15. Plaintiff timely notified

1 Defendant of these issues with respect to Defendant's
2 work at the Bakersfield Property. Id. at ¶ 16.
3 Accordingly, on April 18, 2013, Defendant advised
4 Plaintiff that it would perform certain repairs. Id.
5 at ¶ 17.

6 These repairs were ineffective, and Plaintiff again
7 contacted Defendant to remedy the issue. Plaintiff was
8 unsuccessful in getting Defendant to do so. Id. at ¶
9 18.

10 On June 24, 2013, Defendant notified Plaintiff that
11 it would redo the entire flooring that was subject to
12 the original contract for \$108,530.00. Id. at ¶ 19.
13 Following this proposal, Plaintiff continued to
14 communicate with Defendant's area manager in an attempt
15 to resolve the issues pertaining to Defendant's work at
16 the Bakersfield Property. Id. at ¶ 20.

17 To date, the Outside Area Floor at Plaintiff's
18 Bakersfield Property suffers from holes where water
19 ponds, the floor has blistered, the coloring has faded,
20 and there are cracks. Id. at ¶ 21.

21 Plaintiff filed its initial Complaint in California
22 Superior Court on July 11, 2013 [1]. Defendant removed
23 this Action to this Court on August 28, 2013 [1].

24 On October 7, 2013, Plaintiff filed its First
25 Amended Complaint [9], alleging causes of action for:
26 (1) Breach of Contract; (2) Breach of Implied
27 Warranties; (3) Breach of Express Warranties; (4)
28 Negligence; (5) Fraud; and (6) Violation of Cal. Bus. &

1 Profs. Code § 17200 et seq. On December 6, 2013, the
2 Parties stipulated to dismiss Plaintiff's Fraud cause
3 of action [26].

4 II. Legal Standard

5 A. Motion to Dismiss Pursuant to Rule 12(b)(6)

6 Federal Rule of Civil Procedure 12(b)(6) allows a
7 party to move for dismissal of one or more claims if
8 the pleading fails to state a claim upon which relief
9 can be granted. Dismissal can be based on a lack of
10 cognizable legal theory or lack of sufficient facts
11 alleged under a cognizable legal theory. Balistreri v.
12 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
13 1990). However, a party is not required to state the
14 legal basis for its claim, only the facts underlying
15 it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214,
16 1223 (9th Cir. 1990). In a Rule 12(b)(6) motion to
17 dismiss, a court must presume all factual allegations
18 of the complaint to be true and draw all reasonable
19 inferences in favor of the non-moving party. Klarfeld
20 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

21 The question presented by a motion to dismiss is
22 not whether the plaintiff will prevail in the action,
23 but whether the plaintiff is entitled to offer evidence
24 in support of its claim. Swierkiewica v. Sorema N.A.,
25 534 U.S. 506, 511 (2002). "While a complaint attacked
26 by a Rule 12(b)(6) motion to dismiss does not need
27 detailed factual allegations, a plaintiff's obligation
28 to provide the 'grounds' of his 'entitle[ment] to

1 relief' requires more than labels and conclusions, and
2 a formulaic recitation of a cause of action's elements
3 will not do." Bell Atl. Corp. v. Twombly, 550 U.S.
4 544, 555 (2007) (internal citation omitted). Although
5 specific facts are not necessary if the complaint gives
6 the defendant fair notice of the claim and the grounds
7 upon which the claim rests, a complaint must
8 nevertheless "contain sufficient factual matter,
9 accepted as true, to state a claim to relief that is
10 plausible on its face." Ashcroft v. Iqbal, 556 U.S.
11 662, 678 (2009) (internal quotation marks omitted).

12 If dismissed, a court must then decide whether to
13 grant leave to amend. The Ninth Circuit has repeatedly
14 held that a district court should grant leave to amend
15 even if no request to amend the pleadings was made,
16 unless it determines that the pleading could not
17 possibly be cured by the allegation of other facts.
18 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

19 **III. Discussion**

20 **A. Choice of Law**

21 Defendant contends that New Jersey law is
22 applicable to this Action because the Contract includes
23 a clause providing that "[t]his Agreement shall be
24 governed by and construed in accordance with the laws
25 of the State of New Jersey." Mot. 4:24-28; FAC Ex. A.
26 p.6. Plaintiff argues that California law should apply
27 because California has a materially greater interest in
28 the litigation. Opp'n 5:15-16.

1 A federal court sitting in diversity applies the
2 forum state's choice of law principles to determine the
3 body of substantive law that applies to its
4 interpretation of a contract. See Welles v. Turner
5 Entm't Co., 503 F.3d 728, 738 (9th Cir. 2007) (citing
6 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496
7 (1941)); Fields v. Legacy Health Sys., 413 F.3d 943,
8 950 (9th Cir. 2005) (citing Patton v. Cox, 276 F.3d
9 493, 495 (9th Cir. 2002)). As such, this Court applies
10 California law to determine the controlling substantive
11 law.

12 California has adopted the approach taken in the
13 Restatement (Second) of Conflicts § 187 for
14 interpreting a contractual choice of law provision.
15 See Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th
16 459, 464-65 (1992); Gramercy Inv. Trust v. Lakemont
17 Homes Nevada, Inc., 198 Cal. App. 4th 903, 909 (2011).
18 Under this approach, "the court must first determine:
19 '(1) whether the chosen state has a substantial
20 relationship to the parties or their transaction, or
21 (2) whether there is any other reasonable basis for the
22 parties' choice of law.'" Washington Mutual Bank v.
23 Superior Court, 24 Cal. 4th 906, 916 (2001) (quoting
24 Restatement (Second) of Conflict of Laws § 187(2)). If
25 either test is met, "the court must next determine
26 whether the chosen state's law is contrary to a
27 *fundamental* policy of California." Id. If there is
28 not a conflict, then the court must enforce the

1 parties' choice of law. Id. If there is a conflict,
 2 then the court must "determine whether California has a
 3 'materially greater interest than the chosen state in
 4 the determination of the particular issue.'" Id.

5 "[T]he mere fact that one of the parties to the
 6 contract is incorporated in the chosen state is
 7 sufficient to support a finding of" a substantial
 8 relationship or a reasonable basis for choosing that
 9 state for the parties' choice of law. Application
 10 Group v. Hunter Group, 61 Cal. App. 4th 881, 899
 11 (1998); see also Maxim Crane Works, L.P. v. Tilbury
 12 Constructors, 208 Cal. App. 4th 286, 292 (2012); cf.
 13 Restatement (Second) of Conflict of Laws § 187 cmt. f.
 14 As Defendant is incorporated in New Jersey (see FAC ¶¶
 15 2-3), a reasonable basis exists for the Parties' choice
 16 of New Jersey law.

17 Because a reasonable basis exists for the Parties'
 18 choice, the burden shifts to Plaintiff to show that a
 19 fundamental policy of California would be impaired by
 20 application of New Jersey law to this Action and that
 21 California has a materially greater interest in the
 22 determination of the issue. Maxim Crane Works, 208
 23 Cal. App. 4th at 292 (quoting Washington Mutual Bank,
 24 24 Cal. 4th at 917; citing 1-800-Got Junk? LLC v.
 25 Superior Court, 189 Cal. App. 4th 500, 515 (2010)).

26 Plaintiff appears to acknowledge that application
 27 of New Jersey law would not violate a fundamental
 28 policy of California. See Opp'n 4:26-28. Although

1 application of New Jersey law would undermine
2 Plaintiff's Unfair Competition cause of action, such is
3 not enough to violate a fundamental California policy.
4 See Century 21 Real Estate LLC v. All Prof'l Realty,
5 Inc., 889 F. Supp. 2d 1198, 1217 n.15 (E.D. Cal. 2012)
6 (citing Abat v. Chase Bank USA, N.A., 738 F. Supp. 2d
7 1093, 1096 (C.D. Cal. 2010)); see also Medimatch, Inc.
8 v. Lucent Techs., Inc., 120 F. Supp. 2d 842, 861-62
9 (enforcing choice of law provision designating New
10 Jersey law, holding that applying New Jersey consumer
11 protection law did not violate a fundamental policy of
12 California). Moreover, as Defendant points out, both
13 California and New Jersey have adopted similar
14 provisions of the UCC applicable to this Action.
15 Compare Cal. Com. Code §§ 2316, 2716 with N.J.S.A. §§
16 12A:2-316, 12A:2-719. As Plaintiff fails to identify
17 any other fundamental California policy violated by
18 application of New Jersey law, this Court enforces the
19 choice of law provision.

20 Plaintiff cites to Cardonet, Inc. v. IBM, Case No.
21 C-06-06637 RMW, 2007 U.S. Dist. 14519 (N.D. Cal. Feb.
22 14, 2007) for the proposition that this Court should
23 apply the test for materially greater interest merely
24 because application of New Jersey law would cause its
25 California statutory claims to fail. Opp'n 4:26-5:3.
26 It is unclear why Plaintiff looks to Cardonet for
27 support as the Cardonet court *did not* apply the
28 materially greater interest test. Cardonet, 2007 U.S.

1 Dist. 14519, at *11-17.

2 Because Plaintiff has failed to show that a
3 fundamental California policy would be impaired by
4 enforcing the Contract's choice of law provision, this
5 Court applies New Jersey law to this Action.

6 **B. Real Party in Interest**

7 Under Fed. R. Civ. P. 17(a)(1), "[a]n action must
8 be prosecuted in the name of the real party in
9 interest." While the "Ninth Circuit has not reached
10 the issue, district courts have permitted parties to
11 raise Rule 17 objections in the context of a motion to
12 dismiss under Rule 12(b)(6)." Runaj v. Wells Fargo
13 Bank, 667 F. Supp. 2d 1199, 1205 n.6 (S.D. Cal. 2009).
14 Though the court in Plaintiff's cited case, Neighbors
15 v. Mortg. Elec. Registration Sys., Case No. C 08-5530
16 PJH, 2009 U.S. Dist. LEXIS 5302, at *4-5 (N.D. Cal. Jan
17 27, 2009), held that "[a] challenge to a party's status
18 is brought as an objection under Rule 17(a)(3)," it
19 nevertheless considered the issue as a motion to
20 dismiss under Fed. R. Civ. P. 12(b)(1). In other
21 words, notwithstanding Plaintiff's arguments otherwise
22 (see Opp'n 6:1-17), Defendant's argument is properly
23 before this Court.

24 Defendant argues that Plaintiff is not the real
25 party in interest because the Contract is addressed to
26 "Mr. Massimo Freda" of "Langer Juice" and subsequent
27 change orders were signed by Mr. Freda of "Langer
28 Farms, LLC." Mot. 5:16-22 (citing FAC Exs. A-B).

1 Consequently, Defendant contends that Langer Farms, LLC
2 is the proper party. Id. at 5:23-24. Plaintiff argues
3 that it is clear that Defendant inadvertently left off
4 "Company Inc." after "Langer Juice," and that any
5 ambiguity in the Contract should be interpreted against
6 Defendant. Opp'n 7:3-16. In response, Defendant
7 simply avers that such argument is irrelevant and that
8 Plaintiff has failed to show how its rights to the
9 Contract were assigned from Langer Farms, LLC. Reply
10 4:22-5:8. Consequently, Defendant maintains that
11 Langer Farms, LLC is the proper plaintiff. Id. at 5:6-
12 8.

13 As a preliminary matter, "[w]here an ambiguity
14 appears in a written agreement, the writing is to be
15 strictly construed against the draftsman." In re
16 Estate of Miller, 90 N.J. 210, 221, 447 A.2d 549, 555
17 (1982); Kotkin v. Aronson, 175 N.J. 453, 455, 815 A.2d
18 962, 963 (2003). In this instance, given the ambiguity
19 concerning the name of the contracting party and
20 because Defendant drafted the Contract, the Contract's
21 term should be construed against Defendant to be
22 "Langer Juice Company, Inc."

23 Even accepting Defendant's argument that Langer
24 Farms, LLC is a contracting party to the Contract,
25 Defendant fails to explain why Plaintiff could not sue
26 as a third party beneficiary to the Contract. "A
27 plaintiff asserting third party beneficiary status must
28 establish that the contract was 'made for the benefit

1 of that third party within the intent and contemplation
2 of the contracting parties.'" Grand Street Artists v.
3 Gen. Elec. Co., 19 F. Supp. 2d 242, 253 (D.N.J. 1998)
4 (quoting Grant v. Coca-Cola Bottling Co., 780 F. Supp.
5 246, 248 (D.N.J. 1991)). In this case, not only does
6 the Contract expressly specify Plaintiff's the
7 Bakersfield Property (see FAC Ex. A p.2), but the
8 Contract is also addressed to Mr. Massimo Freda of
9 Langer Juice (see id.). The change orders similarly
10 reference the Bakersfield Property. See FAC Ex. B.
11 Additionally, Defendant's April 18, 2013 letter
12 specifies the "Langer Juice Facility" as the
13 beneficiary of the Stonhard work. FAC Ex. C. In other
14 words, even where Defendant purported to deal with
15 Langer Farms, LLC, the parties to the Contract still
16 explicitly contemplated and fully intended for the
17 Contract to benefit the Langer Juice facility. As
18 such, in the alternative, Plaintiff has standing to sue
19 as a third party beneficiary of the Contract.

20 Finally, even assuming that Defendant was correct
21 in that Plaintiff is not the real party in interest,
22 Fed. R. Civ. P. 17(a) specifically provides for the
23 joinder of the real party in interest. Specifically,
24 Rule 17 provides that "[t]he court *may not* dismiss an
25 action for failure to prosecute in the name of the real
26 party in interest until, after an objection, a
27 reasonable time has been allowed for the real party in
28 interest to ratify, join, or be substituted into the

1 action." Fed. R. Civ. P. 17(a)(3) (emphasis added).
2 In other words, even assuming, *arguendo*, that
3 Defendant's arguments had merit, this Court would still
4 deny Defendant's request to dismiss this matter with
5 prejudice.

6 The Court thereby finds that Plaintiff is a real
7 party in interest in the instant matter and has
8 standing to pursue the suit.

9 **C. Breach of Implied Warranties**

10 Defendant argues that Plaintiff cannot state a
11 claim for breach of implied warranties because: (1)
12 Article 2 of the UCC does not apply to the Contract and
13 (2) even if Article 2 were applicable, all implied
14 warranty claims were disclaimed under the Contract.
15 Mot. 6:14-17.

16 Article 2 of the UCC "applies to transactions in
17 goods." N.J.S.A. 12A:2-102 (West). "Goods" are
18 defined as "all things (including specially
19 manufactured goods) which are movable at the time of
20 identification to the contract for sale other than the
21 money in which the price is to be paid, investment
22 securities and things in action." N.J.S.A. 12A:2-
23 105(1) (West).

24 Under New Jersey law, "[w]hen a contract is for
25 goods and services, a court must determine which aspect
26 of the contract, the goods or the services,
27 predominates." Paramount Aviation Corp. v. Gruppo
28 Agusta, 288 F.3d 67, 72 (3d Cir. 2002) (citing

1 Integrity Material Handling Sys., Inc. v. Deluxe Corp.,
2 317 N.J. Super. 406, 722 A.2d 552, 555 (N.J. Super. Ct.
3 App. Div. 1999)). "In making this determination, a
4 court must examine the whole transaction and look to
5 the essence or main objective of the parties'
6 agreement." Id. (citing Tele-Radio Sys. Ltd. v. De
7 Forest Elec., 92 F.R.D. 371, 374 (D.N.J. 1981)).
8 Typically, New Jersey courts "look to the language and
9 circumstances surrounding the contract, the
10 relationship between the goods and services, the
11 compensation structure, and the intrinsic work of the
12 goods provided." Dilorio v. Structural Stone & Brick
13 Co., Inc., 368 N.J. Super. 134, 142, 845 A.2d 658, 662-
14 663 (N.J. Super. Ct. App. Div. 2004) (quoting Integrity
15 Material Handling Sys., Inc. 722 A.2d at 555); Conopco,
16 Inc. v. McCreadie, 826 F. Supp. 855, 868 (D.N.J. 1993);
17 Quality Guaranteed Roofing, Inc. v. Hoffman-La Roche,
18 Inc., 302 N.J. Super. 163, 166-67, 694 A.2d 1077, 1079-
19 80 (N.J. Super. Ct. App. Div. 1997).

20 Defendant asserts that the UCC does not apply to
21 the Contract because it predominantly provided for the
22 installation of a floor coating system, not the sale of
23 a good. Mot. 7:13-14. Plaintiff contends that the
24 goods aspect predominates because, as shown by the
25 December 10, 2012 change order, Plaintiff purchased a
26 mortar system for \$11,900.00. Opp'n 8:25-28.
27 Plaintiff notes that the original contract price was
28 \$21,255.00. Id. at 8:25.

1 The Court finds that this case is analogous to
2 Quality Guaranteed Roofing, 302 N.J. Super. 163, 694
3 A.2d 1077. In Quality Guaranteed Roofing, the court
4 reversed a trial court's application of the UCC to a
5 contract, finding that a contract for the installation
6 of a roof was primarily one for services, not for
7 goods. Id. at 168. The contract in question regarded
8 the installation of foam roofing on defendant's
9 building. Id. at 164. After discovering alleged
10 quality deficiencies in plaintiff's work, defendant
11 suspended all remaining work and payments and refused
12 to let plaintiff bid on the repair work and did not
13 demand that plaintiff perform any repairs. Id. The
14 trial court found in favor of plaintiff, holding that
15 the UCC applied to the contracts. Id. at 165. The
16 appellate court reversed. Id. The court reasoned that
17 "[w]hile the roofing materials and the installation
18 service were inextricably linked to one another, the
19 purchase of the roofing material was merely incidental
20 to the dominant purpose of the contract: the
21 installation of the roof." Id. at 167. "The goods
22 aspect of the contract," the court found "were [sic]
23 simply to foster the dominant purpose of the contract,
24 to wit, the construction of a new roof." Id.

25 Similarly, in Dilorio, the court found that a
26 contract for the construction of a home - and
27 incidentally the installation of a stone facade in his
28 home - was one either in real property or for services,

1 not one for the sale of goods. 368 N.J. Super. at 141,
2 845 A.2d at 662-663. In particular, the court reasoned
3 that the "price paid by plaintiff to the builder
4 included the value of the stone and labor costs
5 associated with its installation," meaning that the
6 goods aspect of the transaction "was, at most,
7 incidental." Id. at 142, 663.

8 Here, the Parties entered into a contract for the
9 installation of a floor coating system. The Contract
10 calls for the installation of "[a] four component,
11 trowel applied mortar system consisting of a urethane-
12 urea binder, pigments, powders and quartz aggregates."
13 FAC Ex. A p.2. In fact, the Contract consistently
14 refers to the "scope of work" and to the "contract
15 work," implying that the Contract was for the service
16 of installing Defendant's products as well as the
17 actual materials that constitute Defendant's products.
18 Id. at p.2-6. Additionally, the original price
19 quotation assumes, *inter alia*: (1) "non-union labor,"
20 (2) mechanical preparation of the floor, (3) a single,
21 continuous installation. Id. at p.3. Moreover, the
22 Contract price quotations are not itemized and appear
23 to include the value of the material and labor costs
24 associated with installation. This is particularly
25 apparent in the January 29, 2013 change order wherein
26 the scope of the work was changed to remove the
27 alleyway and to "reallocate the revenue, material, and
28 labor for [the alleyway] to the covered pad areas."

1 FAC Ex. B p.10.

2 In other words, the Contract appears to call for
3 Defendant's installation of a floor coating system at
4 the Bakersfield Property. Plaintiff was not merely
5 purchasing Defendant's floor coating products, but also
6 calling for Defendant to install its products at the
7 Bakersfield Property. Just like the contracts in
8 Quality Guaranteed Roofing and Dilorio, the Court finds
9 that the goods aspect of this Contract was merely
10 incidental to the primary purpose of the Contract. As
11 such, the Court holds that the Contract was primarily
12 one for services, not for goods. Consequently, Article
13 Two of the UCC does not apply to the Contract.
14 Correspondingly, because "[t]he commercial warranty
15 provisions found in Article Two of the U.C.C. apply
16 only to 'transactions in goods,'" and because the
17 Contract was not primarily a goods transaction,
18 Plaintiff's claim for breach of implied warranties must
19 fail. Paramount Aviation Corp., 288 F.3d at 72.
20 Accordingly, the Court dismisses Plaintiff's second
21 cause of action for breach of implied warranties.

22 Furthermore, the Court should find that Plaintiff
23 cannot allege further facts to cure its breach of
24 implied warranties claim because the Contract states
25 that it "shall constitute the entire Agreement between
26 the parties." FAC Ex. A p.6. Consequently, the Court
27 **DISMISSES** Plaintiff's claim for breach of implied
28 warranties **without leave to amend.**

1 Because the Court finds that the Contract is
2 primarily one for services and not for goods, and
3 because the Court should find that Article 2 of the UCC
4 does not apply to the Contract, it need not decide
5 whether the Contract's disclaimer language validly
6 disclaims all other warranties.

7 **D. Negligence and Fraud**

8 Defendant contends that Plaintiff's claims for
9 Negligence and Fraud are barred by the economic loss
10 doctrine. Mot. 9:13-15. Plaintiff avers that the
11 economic loss doctrine does not apply where a
12 defendant's tort causes damage to "other property."
13 Opp'n 10:26-11:2. Plaintiff contends that it has
14 sufficiently alleged damage to "other property." Id.
15 at 11:18-20.

16 Because this Court has already dismissed
17 Plaintiff's Fraud claim pursuant to the Parties'
18 stipulation [26, 30], the Court need not address
19 arguments made with respect to that claim.

20 Under New Jersey law, "[g]enerally, the economic
21 loss doctrine prohibits plaintiffs from recovering in
22 tort economic losses to which they are entitled only by
23 contract." Arcand v. Brother Int'l Corp., 673 F. Supp.
24 2d 282, 308 (D.N.J. 2009) (citing Saltiel v. GSI
25 Consultants, Inc., 170 N.J. 297, 310, 788 A.2d 268, 272
26 (2002)). The purpose of the doctrine "is to strike an
27 equitable balance between countervailing public
28 policies[] that exist in tort and contracts law.'" "

1 Travelers Indem. Co. v. Dammann & Co., Inc., 594 F.3d
2 238, 244 (3d Cir. 2010) (quoting Dean v. Barrett Homes,
3 Inc., 406 N.J. Super. 453, 470, 968 A.2d 192, 202 (N.J.
4 Super. Ct. App. Div. 2009) rev'd, 204 N.J. 286, 8 A.3d
5 766 (2010)); see also Spring Motors Distrib., Inc. v.
6 Ford Motor Co., 98 N.J. 555, 579-80, 489 A.2d 660, 672
7 (1985).

8 Furthermore, "[u]nder New Jersey law, a tort remedy
9 does not arise from a contractual relationship unless
10 the breaching party owes an independent duty imposed by
11 law." Saltiel, 170 N.J. at 316, 788 A.2d at 280
12 (citing New Mea Constr. Corp. v. Harper, 203 N.J.
13 Super. 486, 493, 497 A.2d 534, 538 (App. Div. 1985);
14 Int'l Minerals and Mining Corp. v. Citicorp N. Am.,
15 Inc., 736 F. Supp. 587, 597 (D.N.J. 1990)). As a
16 result, generally speaking, "[t]he economic loss
17 doctrine 'bars a plaintiff from recovering purely
18 economic losses suffered as a result of a defendant's
19 negligent or otherwise tortious behavior, absent proof
20 that the defendant's conduct caused actual physical
21 harm to a plaintiff or his property.'" Ayala v.
22 Assured Lending Corp., 804 F. Supp. 2d 273, 284 (D.N.J.
23 2011) (quoting Pub. Serv. Enter. Grp., Inc. v.
24 Philadelphia Elec. Co., 722 F. Supp. 184, 193 (D.N.J.
25 1989)).

26 Plaintiff alleges, primarily, that as a result of
27 Defendant's negligence, it has suffered damages,
28 "including but not limited to, the costs of repair,

1 lost profits, and related expenses." FAC ¶ 48. These
2 damages appear to be purely economic losses. See
3 Spring Motors, 98 N.J. at 566, 489 A.2d at 665
4 ("Economic loss can take the form of either direct or
5 consequential damages. A direct economic loss includes
6 the loss of the benefit of the bargain . . .
7 Consequential economic loss includes such indirect
8 losses as lost profits."). The damages Plaintiff
9 alleges here are entirely consequential to Defendant's
10 alleged failure to install a floor coating system
11 meeting the Contract's standards. Furthermore, these
12 damages do not involve any physical harm to Plaintiff
13 or its property. As a result, the Court holds that the
14 economic loss doctrine bars Plaintiff's recovery for
15 these damages.

16 However, Plaintiff avers that it *has* alleged actual
17 physical harm to other property so as to avoid
18 triggering the economic loss doctrine. See Opp'n
19 12:15-24. In particular, Plaintiff contends that it
20 has alleged damages to "fruit, including . . . peaches
21 and strawberries, were [sic] physically destroyed as
22 said fruit likely rotted" because Plaintiff "was unable
23 to install strawberry and peach processing lines." Id.
24 at 12:18-22. Plaintiff also analogizes this case to
25 Nucal Foods, Inc. v. Quality Egg LLC, 918 F. Supp. 2d
26 1023 (E.D. Cal. 2013). Id. at 11:18-12:14.

27 In Nucal Foods, plaintiff was a supplier of eggs to
28 retail customers. 918 F. Supp. 2d at 1029. The

1 plaintiff purchased eggs from defendant through a
2 commercial exchange. Id. at 1026. In August 2010, an
3 outbreak of salmonella enteritidis triggered a massive
4 recall of eggs. Id. at 1025. The plaintiff sued the
5 defendant for alleged misrepresentations and omissions
6 regarding defendant's compliance with federal egg
7 safety rules. Id. at 1026. As a result of defendant's
8 conduct, plaintiff alleged that it suffered losses not
9 limited to those involving defendant's contaminated
10 eggs. Id. at 1028. In particular, plaintiff alleged
11 that it suffered losses with respect to eggs sourced
12 from other egg producers, plaintiff's product cartons,
13 and plaintiff's packaging materials. Id.

14 The court held that the economic loss rule did not
15 apply because the plaintiff adequately alleged damage
16 to property other than contractual property. Id. at
17 1029. Specifically, plaintiff alleged that it packaged
18 defendant's eggs with those from other suppliers. Id.
19 The court thus inferred that eggs with different
20 origins were recalled together and that some portion of
21 those eggs and packing materials recalled were not
22 related to defendant's eggs. Id. And, because the
23 court also inferred that these recalled eggs and
24 packaging materials were physically destroyed, the
25 court also held that it was plausible that other
26 property was destroyed because of defendant's
27 negligence. Id.

28 Unlike the plaintiff in Nucal Foods, however,

1 Plaintiff here has not alleged any purchase of other
2 property that could have been physically damaged by
3 Defendant's allegedly negligent conduct. Rather,
4 Plaintiff has simply alleged that it was unable to
5 "meet production deadlines and install strawberry and
6 peach processing lines" (FAC ¶ 21), not that it had
7 actually purchased peaches and strawberries in
8 anticipation of installing these processing lines.
9 Without such an averment, even drawing all reasonable
10 inferences in Plaintiff's favor, this Court finds that
11 Plaintiff has not alleged that Defendant's allegedly
12 negligent conduct caused physical damage to other
13 property. Klarfeld, 944 F.2d at 585. Accordingly, the
14 Court **DISMISSES** Plaintiff's fourth cause of action for
15 negligence. However, because the Court finds that
16 Plaintiff could allege further facts to cure its
17 negligence claim, the Court dismisses Plaintiff's
18 negligence claim **with leave to amend**.

19 **E. Violation of Business & Professions Code § 17200 et**
20 **seq.**

21 As discussed, *supra*, New Jersey law applies to the
22 Contract because its application would not violate a
23 fundamental policy of California. As a result, the
24 Court find that the selection of New Jersey law bars
25 Plaintiff's California statutory claims as a matter of
26 law. See Abat, 738 F. Supp. 2d at 1096; Medimatch, 120
27 F. Supp. 2d at 862 (dismissing California UCL claim
28 with prejudice where it enforced a choice of law

1 provision designating New Jersey law). The Court
2 therefore **DISMISSES** Plaintiff's sixth cause of action
3 for violation of California's Business & Professions
4 Code § 17200 et seq. Furthermore, the Court should
5 also find that Plaintiff cannot possibly cure its claim
6 by alleging further facts as its claim is barred as a
7 matter of law. Consequently, the Court should dismiss
8 Plaintiff's claim **without leave to amend**.

9 **F. Limitation of Remedies Clause**

10 Defendant contends that because the Contract
11 expressly limits remedies to the repair of defective
12 areas, Plaintiff's claims for damages should be
13 dismissed. Mot. 13:1-7. Plaintiff, in turn, contends
14 that the limitation of remedies clauses are
15 unconscionable and should not be enforced. Opp'n
16 17:14-18:14.

17 The Contract contains a clause limiting Defendant's
18 liability. Specifically, it states that "The parties
19 acknowledge that in the event repairs need to be
20 performed to the contract work, [Defendant's] liability
21 shall be limited to furnishing the labor and the
22 materials necessary to reinstall the defective areas."
23 FAC Ex. A p.5. The clause further provides that
24 "[Defendant] shall not be responsible for any
25 consequential or incidental damages resulting from any
26 breach of warranty." Id. The warranty section
27 similarly includes a limitation of remedies clause.
28 That clause reads:

1 LIMITATION OF REMEDY. As to any products that
2 were defectively manufactured or installed
3 ("Warranty Issue") discovered on or before the
4 end of the warranty period, [Defendant's]
5 liability is limited to furnishing the labor and
6 materials necessary to repair the defective
7 area. Such repairs are [Plaintiff's] exclusive
8 remedy and the limit of liability of
9 [Defendant], regardless of [Plaintiff's]
10 damages, including incidental and consequential
11 damages, and regardless of any legal theory,
12 including tort, contract, and strict liability.
13 IN NO EVENT SHALL [DEFENDANT] OR THEIR
14 SUBCONTRACTORS OR SUPPLIERS, BE LIABLE FOR ANY
15 SPECIAL, INCIDENTAL, EXEMPLARY, OR CONSEQUENTIAL
16 DAMAGES.

17 Id.

18 In New Jersey, "[i]t is fundamental that parties to
19 a contract may allocate risk of loss by agreeing to
20 limit their liability as long as the limitation does
21 not violate public policy." Chem. Bank of New Jersey
22 Nat'l Ass'n v. Bailey, 296 N.J. Super. 515, 526-27, 687
23 A.2d 316, 322 (N.J. Super. Ct. App. Div. 1997) (citing
24 Moreira Constr. Co. v. Moretrench Corp., 97 N.J. Super.
25 391, 394, 235 A.2d 211, 213 (N.J. Super. Ct. App. Div.
26 1967)); see also Morgan Home Fashions, Inc. v. UTI,
27 U.S., Inc., No. CIV.A.03-0772 JLL, 2004 WL 1950370, at
28 *8 (D.N.J. Feb. 9, 2004) (holding that an exculpatory

1 clause in a customs broker contract limiting damages to
2 \$50 per shipment was enforceable); Marbro, Inc. v.
3 Borough of Tinton Falls, 297 N.J. Super. 411, 417, 688
4 A.3d 159, 162-63 (N.J. Super. Ct. Law Div. 1996)
5 (holding that the New Jersey version of the UCC
6 "permits limitation of remedies in contracts in sales
7 of goods unless the remedy is unconscionable or causes
8 the contract to fail its essential purpose"). Courts
9 still scrutinize such clauses "to ensure that their
10 enforcement is just." Morgan Home, 2004 WL 1950370, at
11 *4. In this vein, such clauses cannot protect a party
12 from its gross negligence or be unconscionable. Id.
13 (citing Tessler and Son, Inc. v. Sonitrol Sec. Sys. of
14 N. New Jersey, Inc., 203 N.J. Super. 477, 483, 497 A.2d
15 530, 533 (N.J. Super. Ct. App. Div. 1985); Carter v.
16 Exxon Co. U.S.A., 177 F.3d 197, 207 (3d Cir. 1999)).

17 "Under New Jersey law, unconscionability cases
18 'look for two factors: (1) unfairness in the formation
19 of the contract, and (2) excessively disproportionate
20 terms." Travelodge Hotels, Inc. v. Honeysuckle
21 Enters., 357 F. Supp. 2d 788, 801 (D.N.J. 2005)
22 (quoting Sitogum Holdings, Inc. v. Ropes, 352 N.J.
23 Super. 555, 564, 800 A.2d 915, 921 (Ch. Div. 2002)).
24 These two factors have been referred to as "procedural"
25 unconscionability and "substantive" unconscionability.
26 Id. "Procedural unconscionability includes, among
27 other things, various inadequacies like age, literacy,
28 and lack of sophistication." Id. Other indicia of

1 procedural unconscionability include "hidden or unduly
2 complex contract terms, bargaining tactics, and the
3 particular setting existing during the contract
4 formation process." Muhammad v. County Bank of
5 Rehoboth Beach, Delaware, 189 N.J. 1, 15, 912 A.2d 88,
6 96 (2006) (quoting Sitogum, 352 N.J. Super. at 564-66,
7 800 A.2d at 921). Substantive unconscionability, on
8 the other hand, "describes an exchange of promises that
9 is so one-sided as to 'shock the conscience' of the
10 court. Travelodge Hotels, 357 F. Supp. 2d at 801.
11 Finally, New Jersey "[c]ourts generally have applied a
12 sliding-scale approach to determine overall
13 unconscionability, considering the relative levels of
14 both procedural and substantive unconscionability."
15 Delta Funding Corp. v. Harris, 189 N.J. 28, 40, 912
16 A.2d 104, 111 (2006).

17 The Court finds that Plaintiff has not sufficiently
18 alleged procedural unconscionability with respect to
19 the limitation of remedies clauses in the Contract.

20 First, the Court finds that the Contract is not an
21 adhesion contract. "[T]he essential nature of a
22 contract of adhesion is that it is presented on a take-
23 it-or-leave-it basis, commonly in a standardized
24 printed form, without opportunity for the 'adhering'
25 party to negotiate except on a few particulars."

26 Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127
27 N.J. 344, 353, 605 A.2d 681, 685-86 (1992). While the
28 Contract appears to be in standardized form, the Court

1 notes that the Contract specifically allows for
2 Plaintiff to negotiate its terms. In particular, the
3 Contract reads "If this proposal meets with your
4 approval please initial the appropriate line(s) above,
5 sign below and fax to my attention. *Or if you prefer*
6 *to utilize your own Purchase Order*, please reference
7 Quote #4098502 and send a copy to my attention." FAC
8 Ex. A p.6 (emphasis added). The Contract also allows
9 Plaintiff to contact Defendant's representative with
10 any questions and, ostensibly, with any further
11 negotiations. Id. Plaintiff, in other words, was not
12 forced to accept the Contract.

13 Second, the Court finds that Plaintiff has failed
14 to allege any other indicia of procedural
15 unconscionability. There is, for example, no
16 indication that there is a great disparity in
17 bargaining power or sophistication between the Parties.
18 Rather, both Parties appear to be relatively
19 sophisticated commercial parties. See FAC ¶¶ 1-3.
20 While Plaintiff correctly notes that the limitation of
21 remedies portion of the Contract is in smaller,
22 unbolded type, this is insufficient, in and of itself,
23 to show procedural unconscionability. See Jones v. The
24 Chubb Institute, CIV A 06-4937 KSH, 2007 WL 2892683
25 (D.N.J. Sept. 28, 2007). The text in the limitation of
26 remedies provision is not so small as to be unreadable
27 and the term explicitly disclaiming liability for
28 special, incidental, exemplary, and consequential

1 damages is capitalized and prominent. FAC Ex. A p.5.

2 Likewise, the Court finds that Plaintiff has failed
3 to allege substantive unconscionability in the
4 limitation of liability and limitation of remedies
5 clauses. As discussed, *supra*, exculpatory clauses in
6 commercial contracts are routinely enforced under New
7 Jersey law and are specifically provided for in the New
8 Jersey UCC. See N.J.S.A. 12A:2-719.

9 Because Plaintiff has failed to show procedural or
10 substantive unconscionability, the Court finds that the
11 limitation of remedies and limitation of liability
12 clauses may be enforced. As a result, the Court **GRANTS**
13 Defendant's Motion to Dismiss with respect to
14 Plaintiff's claims for damages. However, because
15 Plaintiff could potentially cure its theory of
16 unconscionability by alleging more facts, the Court
17 should allow Plaintiff **leave to amend**.

18 **IV. Conclusion**

19 For the reasons set forth above, this Court **GRANTS**
20 Defendant's Motion to Dismiss [10].

21 Specifically, the Court:

- 22 1. **DISMISSES** Plaintiff's second cause of action for
23 breach of implied warranties **without leave to**
24 **amend;**
- 25 2. **DISMISSES** Plaintiff's fourth cause of action for
26 negligence **with twenty days leave to amend;**

27 //

28 //

- 1 3. **DISMISSES** Plaintiff's sixth cause of action for
2 violation of California Business & Professions Code
3 § 17200 et seq. **without leave to amend;** and
4 4. **DISMISSES** Plaintiff's claims for damages **with**
5 **twenty days leave to amend.**

6
7
8
9 **IT IS SO ORDERED.**

10 DATED: January 30, 2014

11
12 RONALD S.W. LEW

13

HONORABLE RONALD S.W. LEW

14 Senior, U.S. District Court Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28